FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 25 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.

No. 30

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

RIVERSIDE CEMENT CO.,

Respondent.

PETITION FOR REHEARING.

LOUIS W. MYERS,
PIERCE WORKS,
433 South Spring Street, Los Angeles 13,
Attorneys for Respondent Riverside Cement Co.

O'MELVENY & MYERS,
Of Counsel.

TOPICAL INDEX

PAGE

I.

The court has overlooked the point and argument that the Commission wholly failed to find upon the issue, basic as to Riverside, as to whether the latter had knowingly participated in the nation-wide combination charged. The Commission did not so find 3

II.

The court has misconceived and misapprehended the facts with reference to Riverside's trade practices in such a manner as materially to affect the correctness of the decision as to this respondent 6

III.

The court has overlooked the point and argument that the word "price" as used in the Robinson-Patman Act means destination price as between truly competitive buyers; and that upon this proper concept no price discrimination was shown as to Riverside 9

TABLE OF AUTHORITIES CITED

Cases	Page
Allen v. United States, 4 F. (2d) 688	4
Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U. S. 193	4
Cement Mfrs. Protective Assn. v. United States, 268 U. S. 588	5
Corn Products Ref. Co. v. Federal Trade Comm., 324 U. S. 726	12
Federal Trade Comm. v. A. E. Staley Mfg. Co., 324 U. S. 726	12
Heitmyer v. Federal Communications Comm., 95 F. (2d) 91	4
Minner v. United States, 57 F. (2d) 506	4
Morrison v. California, 291 U. S. 82	4
Saginaw Broadcasting Co. v. Federal Communications Comm., 96 F. (2d) 554	4
Salt Producers' Assn. v. Federal Trade Comm., 134 F. (2d) 354	5
United States v. International Harvester Co., 274 U. S. 693	5
United States v. Standard Oil Co., 47 F. (2d) 288	5

Miscellaneous	
80 Congressional Record, pp. 8122, 8223-4, 9903-4	13
80 Congressional Record, pp. 8229, 8230	9
80 Congressional Record, p. 9416, remarks of Rep. Utterback on the Senate and House Conference Report on the Robinson-Patman Act	10
Senate Document No. 71, 73d Cong., 1st Sess., p. 127	7, 8

Statutes	
Robinson-Patman Act, Sec. 2(a)	13
Robinson-Patman Act, Sec. 2(d) (80 Cong. Record, p. 8123)	11

IN THE

Supreme Court of the United States

October Term, 1947.
No. 30

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

RIVERSIDE CEMENT CO.,

Respondent.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent Riverside Cement Company respectfully petitions for a rehearing of this cause upon the following grounds:

1. The Court has overlooked the point and argument that the Commission wholly failed to find upon the issue, basic as to Riverside, as to whether the latter had knowingly participated in the nationwide combination charged. The Commission did not so find.

2. The Court has misconceived and misapprehended the facts with reference to Riverside's trade practices in such

a manner as materially to affect the correctness of the decision as to this respondent.

3. The Court has overlooked the point and argument that the word "price" as used in the Robinson-Patman Act means destination price as between truly competitive buyers; and that upon this proper concept no price discrimination was shown as to Riverside.

4. This respondent also joins in and adopts each and all of the grounds for rehearing specified by other respondents in these companion cases, including the jurisdictional grounds urged by respondent Marquette Cement Manufacturing Company in case No. 25.

In order to avoid duplication, we propose to discuss herein only the first three points above specified, leaving it to others to discuss the case in its general aspects.

Riverside's main defense throughout this entire proceeding has been that it conducts its business in an isolated section of the country where the trade practices with reference to the marketing of cement vary so greatly from those in use elsewhere that no inference of participation in the nationwide combination charged could fairly be drawn against it. As the case has progressed; this defense has evolved into points concerning the sufficiency of the evidence and the findings as to Riverside. to which we now turn.

I.

The Court Has Overlooked the Point and Argument That the Commission Wholly Failed to Find Upon the Issue, Basic as to Riverside, as to Whether the Latter Had Knowingly Participated in the Nationwide Combination Charged. The Commission Did Not so Find.

In its opinion the Court did hold, contrary to the contentions of all respondents, that the Commission had found as to the *existence* of the nationwide combination asserted by the Commission.

Riverside has argued throughout this entire case, however, and wholly aside from the issue as to the *existence* of the asserted nationwide conspiracy, that the Commission's order as against Riverside could not be justified unless the Commission had found, with support in the evidence (a) that Riverside *knew* that other parties had combined to violate the law, and (b) thereafter knowingly cooperated to further the object of the conspiracy.*

This point was not discussed at all in the opinion of the Court, although that opinion, in footnote 17 at page 31 thereof, gave at least tacit recognition to the principle we invoke when it recognized that there must be *evidence* of guilty knowledge on the part of the participants in order to support a finding of combination generally.

Evidence alone, however, is not enough. There must also be a *finding* in order to hold an asserted participant.

---

*The argument addressed to this point and the authorities in support thereof will be found at pages 13 to 16 of Riverside's brief.

Morrison v. California, 291 U. S. 82, 92, 93; *Allen v. U. S.*, 7 Cir., 4 F. (2d) 688, 691; *Minner v. U. S.*, 10 Cir., 57 F. (2d) 506, 511. And we search the record in vain for any such finding as to Riverside. It is certainly not to be found, for instance, in the argumentative dissertations and quotations from the evidence with which the "findings" as filed abound; for it is well settled that these do not constitute findings as to the *facts*. *Atchison, Topeka & Santa Fe Ry. Co. v. U. S.*, 295 U. S. 193, 201-202; *Saginaw Broadcasting Co. v. Federal Communications Comm.*, App. D. C., 96 F. (2d) 554, 559-560; *Heitmeyer v. Federal Communications Comm.*, App. D. C., 95 F. (2d) 91, 96.

The short of it is that the Commission has found no more than that *some* (?) of the respondents were parties to substantially *all* of the activities complained of; that others (?) have participated in "lesser" degree; that still others (?) were *mere followers;* and, lastly, that a "few" (?) reluctantly participated "from time to time" in "some" of the practices. [Findings, par. VI, 24 R. 15984.] *None* of the members of these four groups are identified or disclosed in any way. It has found guilty knowledge as to no one, and least of all as to the "mere followers" and the "reluctant" ones. Nor are the practices of which the Commission speaks identified, since they are referred to only as "current practices of the industry" and "customs of the trade."

The Court, at page 32 of the slip opinion, gives some recognition to the difference in trade practices in River-

side's trade area, and it implies at page 33 that Riverside, as one of the West Coast mills, belongs to the "mere follower" class, a fact as to which the Commission, as we have seen, made no finding one way or the other.

But is a "mere follower," as to whom no guilty knowledge is found, a *conspirator?* The Commission so argues, but the courts, with all respect, until now have unanimously held otherwise: that pricing patterns and trade practices resulting from follow-the-leader tactics afford no evidence of participation in an unlawful combination. *Cement Mfrs. Protective Assn. v. U. S.*, 268 U. S. 588, 605; *U. S. v. International Harvester Co.*, 274 U. S. 693, 708-9; *U. S. v. Standard Oil Co.*, D. C. Mo. (3 Circuit Judges sitting), 47 F. (2d) 288, 316. And in *Salt Producers' Assn. v. Federal Trade Comm.*, 7 Cir., 134 F. (2d) 354, 357, it was held that a mere "common course of action" was not enough; it must be a "*planned* common course of action," connoting "illegal *contractual* arrangements."

It is therefore respectfully submitted that the Commission has wholly failed to find as to the requisite element of guilty knowledge; that the order as to Riverside is without support in the absence of such a finding; and that the question presented is of sufficient gravity to warrant a consideration and decision by the Court.

II.

The Court Has Misconceived and Misapprehended the Facts With Reference to Riverside's Trade Practices in Such a Manner as Materially to Affect the Correctness of the Decision as to This Respondent.

The writer of the dissenting opinion was warrantably impressed by the showing made by, *inter alia,* the West Coast mills. "The absence of sufficient evidence to support the conclusions of the Commission was" as to them "especially impressive." (Dis. Op. p. 8.)

The majority opinion conceded that "The record does show such differences (in trade practices) as those suggested" with reference to the West Coast mills. And it goes on to say that "It is correct to say, therefore, that the sales practices of those particular respondents, and *perhaps of other respondents as well,* were not at all times *precisely* like the sales practices of *all* or *any* of the others."

With all deference, this pronouncement, given the accentuations which we have italicized, is so patent an understatement as to amount to a misconception and misapprehension of the facts, however understandable this may be in view of the size of this record and the multiplicity of briefs on file.

For instance, it is said that all of the central California mills became basing points in 1929. In this connection, however, it should be recalled that this change brought about a wholesale lowering of prices in that area and led the Commission to report to the Senate in 1933

that because of this change in practices (with the resultant elimination of non-base mills) the basing point method "as it is understood and applied in the eastern part of the United States" (*i. e.*, the method described in the complaint herein) was no longer in use. See Senate Doc. No. 71, 73d Cong., 1st Session, p. 127.

The opinion also mentions the existence of the zones in Southern California and the use of price lists. Again it must be recalled that in Senate Doc. No. 71 the Commission reported to the Senate, as regards Riverside and the other Southern California companies that (we emphasize) *"Fixing prices by the basing-point method has been abandoned* and prices are now fixed by price lists circulated among manufacturers and dealers showing the price to dealers at all delivery points." (*Ibid.*, p. 115.)

It is also said that the Institute freight rate books did not extend to the states where *some* of the California companies did business. The evidence was undisputed, and the Commission so found, that the books had never been used in *any* of the states where *any* of the California mills shipped their cement. [17 R. 13224; 24 R. 16008; see also Com. Bf. p. 70.]

Without going further into detail, the evidence showed as to Riverside and its marketing area: Zone pricing in California (where Riverside sold 94% of its cement); no use of freight rate books; no phantom freight; no controlling base for Arizona or Nevada, since any and all mills doing business in that area were free to, and did, institute price changes at discretion; unlimited f. o. b.

mill bids to governmental agencies (Riverside alone made 875 such bids during the decade 1930-1940); no so-called "punitive" bases; wholesale trucking, as opposed to the Commission's all-rail thesis; no discrimination against foreign cement. Those matters (and others) are all pointed out in Riverside's brief at pages 17 to 37. In addition to this, it must not be overlooked that the Commission itself reported to the Senate in 1933 (again by means of Senate Doc. No. 71) that *there were no basing points whatever on the Pacific Coast;* and opposite page 27 of Riverside's brief there is set forth a reproduction of the Commission's own map which graphically illustrates this fact.

Under these circumstances it is respectfully urged that even if the Commission had found (as it did not find) that Riverside was a knowing participant in the combination alleged, such finding would have been without substantial or rational support from the evidence; and that the overwhelming evidence as to the differing nature of the trade practices in Riverside's sales area as compared with those elsewhere urgently warrants a reconsideration of the Court's holding in so far as Riverside is concerned.

III.

The Court Has Overlooked the Point and Argument That the Word "Price" as Used in the Robinson-Patman Act, Means Destination Price as Between Truly Competitive Buyers; and That Upon This Proper Concept No Price Discrimination Was Shown as to Riverside.

The evidence showed, and Riverside's brief pointed out, that in order to do business at all in Arizona east of Phoenix and Tucson, the California mills were compelled to absorb freight because of the El Paso mill's more favorable freight rate. The evidence also showed, and it was likewise pointed out, that, due to deserts and distance, there was no competition between cement dealers and other purchasers of cement in the areas where the California mills had a freight advantage, on the one hand, and the areas where El Paso had its freight advantage, on the other.

It was then pointed out (Resp. Bf. pp. 48-49) that the discussions in Congress at the time of the enactment of the Robinson-Patman amendment amply showed that the purchasers sought to be shielded from the proscribed discrimination were purchasers *similarly situated*, which is to say, actually in competition *with each other* in the same market or trade area. These discussions leave no doubt whatever as to the true congressional intent in this regard. We quote (emphasis is supplied):

(Pages 8229, 8230 of 80 Congressional Record):

"Mr. Boileau. * * *

Mr. Chairman, for the purpose of clarifying the congressional intent, I have taken this time to get

the opinion of the distinguished gentleman from Arkansas as to his understanding of the meaning of the language at the beginning of section 2 (a), page 5, of the bill. The section starts out as follows:

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality—

And so forth. *My understanding of that language is that the sellers may not discriminate, but they may, nevertheless, charge different prices in different communities to persons who are not competitors. In other words, as I understand it—and I ask the gentleman whether or not this is his opinion—a seller may sell a commodity in one community at one price and sell it in another community at a different price, because those two purchasers, even though they are purchasers for resale, are not competitors, and therefore there is no discrimination in price. Is that the understanding of the distinguished gentleman from Arkansas* [Mr. Miller]?

Mr. Miller. *They are operating in different markets. I do not think there is any doubt about the language.*"

(Page 9416 of the same volume):

(Remarks of Representative Utterback on the Senate and House Conference Report on the Act):

"In its meaning as simple English, a discrimination is more than a mere difference. *Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvan-*

tage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves the deficit inevitably to be made up on higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, *where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill."*

A similar discussion was had with reference to the language "all other customers competing in the distribution of such products or commodities" appearing in subsection (d) of section 2 of the Act, as amended. The following comments appear at page 8123 of volume 80 of the Record:

"Mr. Boileau. I am referring to subsection (d), on page 9. At the end of the paragraph it says:

'Unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities.'

Customers competing in the distribution of such products or commodities—*that means the same city or community, with competitors in the same town. But it does not mean that an advertising allowance to a customer on a corner in New York must be made to one in my home town in Wisconsin. They do not compete."*

This point with reference to truly competitive buyers was, with all respect, neither discussed nor answered in the Court's opinion. It has never been discussed nor answered by the Commission during the ten years this proceeding has been pending. One is permitted to infer that the Commission has given this point the silent treatment (as was the case with reference to its report to the Senate in 1933) because it *has* no answer.

It is no answer, for instance, to refer to the *Staley* and *Corn Products** cases. In those cases the purchasers were candy manufacturers competing on a nation-wide basis. *Their* trade area was national.

This, however, has nothing to do with the cement business. Obviously a cement dealer in Tucson, for instance, and another in Bisbee, who are separated by over a hundred miles of desert and sagebrush, do not compete against each other at all.

Implicit in the Commission's whole argument is the proposition that the true price is the price received by the seller after deduction of freight. Here again Congress has spoken to the contrary.

In the first place, the 74th Congress pointblank refused to enact an amendment defining "price" as the amount received by the vendor after deducting transportation charges; which, notwithstanding, is what the Commission

---

*Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746; Corn Products Ref. Co. v. Federal Trade Commission, 324 U. S. 726.

now asserts the "true price" to be. (80 Cong. Rec. 8122, 8223-4, 9903-4.) In the second place, Section 2(a) of the Act refers to permissible differentials (in *price*, of course) which make only due allowance for differences in the cost of manufacture, sale or *delivery*. *But there can be no cost of delivery at the mill.* Hence again it is perfectly obvious that the word "price," as used in the Act, means *price at the point of delivery*, wherever it may be.

The result is that, as postulated above, the Robinson-Patman Act prohibits discrimination in *delivered* price as between *truly competitive* purchasers. And in Riverside's case, at least, there was no evidence whatever that its freight absorptions produced any such result.

For each and all of the grounds and reasons specified above, this respondent respectfully prays that a rehearing be granted herein and that pending such rehearing the mandate of the Court may, by appropriate order, be stayed.

Respectfully submitted,

LOUIS W. MYERS,

(Sgd.) PIERCE WORKS,

Attorneys for Respondent.

O'MELVENY & MYERS,
Of Counsel.

Certificate of Counsel.

I, Pierce Works, do hereby certify that I am one of the attorneys for respondent herein and that the foregoing petition is presented in good faith and not for delay.

(Sgd.) PIERCE WORKS.